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No. 00-517

In the Supreme Court of the United States

WILLIAM MORRIS RISBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly found that the government adhered to the scope of the use immunity granted to petitioner with respect to the production of documents to the grand jury.

2. Whether petitioner's conviction and punishment for violations of 18 U.S.C. 666(a)(1)(B) and (a)(2) are barred by the Double Jeopardy Clause of the Fifth Amendment.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is not reported, but the judgment is noted at 211 F.3d 124 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2000. A petition for rehearing was denied on May 9, 2000. Pet. App. 13. The petition for a writ of certiorari was not filed until August 16, 2000, and therefore is out of time under Rule 13 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiring to embezzle federal funds, pay and receive kickbacks, and money laundering, in violation of 18 U.S.C. 371, 666, and 1956. He also was convicted on 18 counts of embezzlement of federal funds (18 U.S.C. 2 and 666(a)(1)(B)); 19 counts of paying kickbacks to an agent of a local government (18 U.S.C. 2 and 666(a)(2)); 19 counts of receiving kickbacks in connection with the business of a local government agency (18 U.S.C. 2 and 666(a)(1)(B)); and seven counts of money laundering (18 U.S.C. 2 and 1956(a)(1)(B)(i)). He was sentenced to 97 months' imprisonment. The court of appeals affirmed petitioner's convictions and sentence in an unpublished per curiam decision. Pet. App. 1-2.

1. Petitioner paid kickbacks to James Hargrave, a roofing inspector for the Dallas Independent School District (DISD), to procure contracts and falsify that petitioner's company performed roofing repairs on the district's properties. Gov't C.A. Br. 3. At the time, petitioner was doing business under the company name of Time Saving Construction. The grand jury subpoenaed numerous documents from banks, subcontractors, and the DISD. Those documents formed the basis for petitioner's prosecution and were introduced into evidence at trial. *Id.* at 3-4.

After reviewing those documents, the prosecutor was unsure whether there were additional documents in the possession of Time Saving, petitioner's company. The grand jury subpoenaed documents from the custodian of Time Saving. In response to that subpoena, petitioner's attorney provided several notebooks that contained copies of records. Petitioner had no hand in the production of those documents. Gov't C.A. Br. 4.

Review of those records revealed that they were copies, not originals, and that they had been altered. As a result, the grand jury issued a second subpoena to Time Saving requesting original records. The prosecutor also asked that the corporation identify a custodian of records. *Ibid.* Petitioner's lawyer identified petitioner as the custodian and petitioner moved to quash the subpoena. *Ibid.*

In response, the government sought, and the district court granted, an order conferring act-of-production immunity on petitioner. Gov't C.A. Br. 5. The order was narrowly crafted to restrict the grant of immunity and stated in pertinent part:

> The immunity granted pursuant to this order is limited to the act of producing the requested records and any testimony relating to the production of said records * * *. The immunity granted by this order does not extend to the content of any records provided by [petitioner] in his capacity as Custodian of Records of Time Saving.

Pet. 4. Petitioner appeared before the grand jury on February 18, 1998, and produced originals of some of the documents that the grand jury had already seen. Petitioner also told the grand jury that, several months earlier, the government had acquired records from other sources, including petitioner's accountant. Gov't C.A. Br. 5 . During petitioner's appearance, the prosecutor limited his questioning to whether petitioner was custodian of the records, whether he understood the limits of the grant of immunity to him, and whether he had produced all records that he possessed. *Ibid.*

After he was indicted on the instant charges, petitioner moved to dismiss the indictment on the ground that the government had used his immunized testimony

against him and requested a hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), requiring the government to establish that the evidence supporting the indictment came from sources wholly independent of testimony given under the immunity grant. In response, the government provided the district court with copies of subpoenas establishing that it had obtained the evidence likely to be used against petitioner from independent sources well before petitioner testified before the grand jury. In addition, the prosecutor assured the court that the government would not use at trial or make reference to any of the records that petitioner had produced in response to the subpoena. Gov't C.A. Br. 5-6. The district court denied petitioner's motion.

At trial, the government, in accordance with its prior representations, did not use or refer to the documents that petitioner presented to the grand jury or the testimony he gave before the grand jury. In addition, the government sought to ensure that the source of all the documents used at trial was clearly identified and explained by each witness who sponsored the exhibits into evidence. The dates on the subpoenas confirmed that the government possessed this evidence before petitioner's grand jury appearance. Gov't C.A. Br. 6, 11-15.

2. On appeal, petitioner claimed, *inter alia*, that his indictment should have been dismissed because the government impermissibly used his immunized testimony. He also claimed, for the first time, that he was improperly convicted of both giving and accepting kickbacks, and that those counts should have merged. The court of appeals rejected those arguments and affirmed in an unpublished per curiam decision. Pet. App. 1-2. In so holding, the court found that "[t]he

record shows that the immunity granted to [petitioner] did not extend to the contents of any records he produced." *Id.* at 2. The court also held that petitioner's Section 666(a)(1)(B) and (a)(2) convictions did not constitute multiple punishments, because each required proof of facts that the other offense did not require. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the decision below is incorrect under this Court's decision in *United States* v. *Hubbell*, 120 S. Ct. 2037 (2000). Contrary to petitioner's claim, the courts below properly concluded that the government did not make any use of the documents that petitioner produced pursuant to the limited grant of immunity. There is no reason for this Court to review that fact-bound determination here, or to remand for reconsideration of that finding in light of *Hubbell*.

In *Hubbell*, the defendant received a subpoena duces tecum calling for the production of 11 different categories of documents to the grand jury. After he invoked his Fifth Amendment privilege against self-incrimination, the defendant was granted use immunity under 18 U.S.C. 6002, and he thereafter produced some 13,000 pages of documents in response to the subpoena. He also answered questions concerning whether those documents were responsive to the grand jury's subpoena. 120 S. Ct. at 2040. The contents of the documents that the defendant produced led to his indictment for mail fraud, wire fraud, and tax fraud. The district court dismissed his indictment on the ground that all the evidence used at trial was "derived either directly or indirectly from the testimonial aspects of [the defendant's] immunized act of producing those

documents." *Id.* at 2041. The court of appeals reversed on the ground that the district court should have determined whether the Independent Counsel had prior awareness of the documents. *Ibid.*

This Court affirmed. The Court focused on "the testimony inherent in the act of producing" documents to the grand jury, rather than on the contents of the documents themselves. 120 S. Ct. at 2045-2046. Because of the large volume of documents requested by the subpoena, the Court reasoned that "the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." *Id.* at 2046. See *ibid.* ("Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"). That fact, according to the Court, gave the production a "testimonial aspect." *Id.* at 2048. As a result, the Court held that the indictment had to be dismissed unless the government could show that the evidence used to obtain the indictment was "wholly independent" of the testimonial aspect of the defendant's immunized conduct in assembling and producing the documents. *Ibid.* The Court concluded that the government "does not claim that it could make such a showing." *Ibid.*

The circumstances in *Hubbell* are far different from those here. To begin with, the production at issue in this case was much more limited than the one in *Hubbell*, and was preceded by previous productions that were not subject to any claim of immunity. In

Hubbell, the Independent Counsel did not have any documentary evidence against the defendant until the defendant himself provided those documents to the grand jury, and this Court concluded that the government did not attempt to show that the evidence was obtained from "wholly independent" sources. 120 S. Ct. at 2048. Here, the prosecutor conclusively demonstrated to the district court that the government had assembled its evidence against petitioner well before his grand jury appearance from documents obtained in response to other subpoenas. The government also showed that it had not used any leads from the information that petitioner had provided to the grand jury in its prosecution against petitioner. Indeed, the prosecutor demonstrated that all the government's trial evidence came from sources that predated petitioner's grand jury appearance. See Gov't C.A. Br. 11-15 (discussing evidence).

In *Hubbell*, this Court reaffirmed "the critical importance of protection against a future prosecution based on knowledge and sources of information *obtained from the compelled testimony*." 120 S. Ct. at 2045 (emphasis added; internal quotation marks omitted). Nothing "obtained from the compelled testimony" in this case was used to prosecute petitioner, and he is accordingly not entitled to any relief under *Hubbell*.[1]

2. Petitioner also argues (Pet. 8-11) that his convictions under 18 U.S.C. 666(a)(1)(B) and (a)(2) subject him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the Fifth

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[1] In any event, we note that the immunity granted to petitioner was quite limited. The scope of petitioner's immunity specifically allowed the government to make derivative use of any information that petitioner provided. See Gov't C.A. Br. 14.

Amendment to the Constitution. The court of appeals correctly rejected that claim.[2]

Section 666(a)(2) prohibits a person from giving or offering anything of value to an agent of a local government in connection with any business before the local government. Section 666(a)(1)(B), on the other hand, makes it illegal for an agent of a local government to solicit or demand anything of value in connection with business before the local government.[3] Petitioner acknowledges (Pet. 9) that the two offenses are different within the meaning of the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932), because each offense involves an element that is not contained in the other offense. For the jury to convict petitioner of *giving* a bribe, the jury was required to find that peti-

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[2] As noted above, petitioner failed to raise this argument in the trial court. The court of appeals addressed and rejected the argument without addressing that default. Pet. App. 2.

[3] Section 666 provides in pertinent part:

> (a) Whoever * * * (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> * * * * *
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

tioner corruptly intended to influence Hargrave's official actions, without regard to the intent of Hargrave. By contrast, for the jury to convict petitioner on the Section 666(a)(1)(B) counts, the jury was required to find that Hargrave intended to be influenced by petitioner, and that petitioner thereby aided and abetted the receipt of the bribe. See *United States* v. *Jennings*, 160 F.3d 1006, 1017 (4th Cir. 1998). In short, the "giving" of bribes by petitioner and "acceptance" of bribes by Hargrave, as aided and abetted by petitioner, are different acts requiring different elements of proof.

Without reference to any specific evidence, petitioner argues (Pet. 10) that Congress did not intent that result. Contrary to petitioner, Congress certainly could have contemplated that a defendant who successfully bribed a public employee could be punished under both sections. See, *e.g.*, *United States* v. *Barash*, 365 F.2d 395, 399 n.3 (2d Cir. 1966) (recognizing that the government can proceed against a payor of a bribe both as a principal and as an aider and abettor of the recipient of the bribe); *United States* v. *Kenner*, 354 F.2d 780, 785 (2d Cir. 1965) (payor of a bribe can be an aider and abettor of the recipient's receipt of the bribe), cert. denied, 383 U.S. 958 (1966). Hence, the court of appeals properly concluded that petitioner could receive multiple punishments for his Section 666 convictions, and further review by this Court of that ruling is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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